sibly claim or assert that the guest-house is in connection with the employer's trade, business or profession. As for the first part, it must be considered and realised that the flow of guests, restricted as they are to the employees of a business concern on visits to Kuala Lumpur, does not make the guest-house a public dwelling in the sense that it is for the use of the general public. The work the respondents do is the work of domestics. And I venture to believe that the work they do in this guest-house is rather less than the daily chore for a permanent residence. The purpose of the Ordinance in ensuring the proper remuneration and protection for employees of various classes is served without placing on the definition a false meaning. It must be an inevitable conclusion that the guest-house of the appellant firm is not a public dwelling-house but a private dwelling-house and that the respondents are domestic servants employed in a private dwelling-house. Their claim therefore fails.

This conclusion relieves me from having to deal with the complaint of the appellant that the claim of the respondents for overtime is too imprecise for determination.

The appeal is allowed with costs, but I venture to suggest that if no appeal is lodged from my decision, the appellant will not press for its costs.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Syarikat K. Chandra.*

TAN YEW LAI v. S. SHADIQUE

[O.C.J. (Chang Min Tat J.) April 19, 1977]
[Kuala Lumpur — Civil Suit No. 508 of 1971]

Landlord and Tenant — Tenancy at will — Oral agreement to lease 90 years — Oral agreement subject to written contract — Purchaser in possession.

The plaintiff was a housing estate developer. There was an agreement between the plaintiff and the defendant in respect of a house known as 217 Tan Yew Lai Gardens. It was evidenced partly in writing in the form of a receipt (dated January 29, 1969) for the first deposit of $3,950. It was captioned "Official Receipt" and acknowledged the receipt of the first payment for house No. 217. Inscribed on this receipt were the words "Cash Price $12,950, Loan $9,000, 90 years lease" and the additional words "This receipt is valued (sic) up to March 31, 1969." Despite attempts by the plaintiff to get the defendant to enter into a written agreement, the defendant had at all times failed and still failed to do so. The defendant did not move into occupation until November 1, 1969. The plaintiff claimed possession of the house and land and damages.

Held: (1) the agreement in this case was for a leasehold;

(2) no agreement crystallises where the parties failed at the time specified or within such time as may be reasonable in the circumstances to enter into such a written contract;

(3) in this case, the defendant had no claim either to the freehold or the leasehold of the house and she and her husband had no right to remain in the house or on the land. They were at all times tenants at will;

(4) the plaintiff was entitled to possession of the house and land and for damages but the deposit should be refunded to the defendant.

Cases referred to:-

(1) *Chillingworth* v. *Esche* [1924] 1 Ch. 97, C.A.

(2) *Eccles* v. *Bryant* [1948] Ch. 93 C.A.

CIVIL SUIT.

J. Somasundram for the plaintiff.

Bhag Singh for the defendant.

Chang Min Tat J.: The plaintiff is a housing estate developer. He owns a piece of land which he has had subdivided into building lots. He builds houses and sells them, sometimes together with the land and at other times on a lease of the lot.

There is an agreement between the plaintiff and the defendant in respect of a house now known as 217 Tan Yew Lai Gardens, Puchong, Kuala Lumpur. No dispute arises as to the existence of this agreement. It is evidenced partly in writing, in the form of a receipt for the first deposit of $3,950. It is captioned Official Receipt and acknowledges the receipt of the first payment for house No. 217. The date is January 29, 1969. However inscribed on this receipt are the words "Cash Price $12,950, Loan $9,000, 90 years lease," and the additional words "This receipt is valued (sic) up to March 31, 1969." There is no allegation that the superimposed words were not on the receipt when it was handed over to the defendant's husband, who, as husbands sometimes do, managed this particular transaction for her. The defendant's husband reads and speaks English.

Despite attempts by the plaintiff to get her to enter into a written agreement, the defendant has at all times failed and still fails to do.

At the time of the payment of the deposit, the house was not fully erected. The defendant did not move into occupation until November 1, 1969.

The plaintiff now claims as in the endorsement to the writ, "to recover possession of the house and land and for $808.68 for arrears of instalments on the purchase of the house and land rent, maintenance fees insurance and water supply up to May 20, 1971 and for payments in respect thereof from May 21, 1971 until the date of giving up possession and costs." There would appear to be a conflict between the claim to recover possession and the claim for arrears of "instalments" for the purchase of the house, but no point was taken. The statement of claim supplied certain purported terms of the agreement. The agreement was for the sale of a house and a lease for 30 years commencing from January 1, 1969, renewable twice on the following terms: (i) Cash price for the house $12,950; (ii) less deposit paid $3,950; (iii) the balance of $9,000 payable over 15 years at 10% interest per annum; (iv) the monthly instalments of $99 to commence from November 1, 1969; and (v) land rent payable was $120 per annum and (vi) maintenance fee at $96 per annum. These terms were conceivably not the only terms.

When it came to working out the balance owing from November 1, 1969 to May 20, 1971, the plaintiff claimed $326.70 for arrears of instalments and interest and a further sum of $481.98 for land rent, maintenance and insurance. The total came to $808.68

but it is obvious that this sum includes a claim for insurance which the plaintiff had nowhere alleged the defendant had agreed to pay. But again, no point was taken on it and in fact, counsel for the defendant conceded the arithmetics of this sum, subject however to a finding that the defendant was liable to pay it.

The defence contended the agreement was for the freehold of the lot and not for a leasehold. It otherwise accepted that the monthly instalments were $99 commencing November 1. It refuted all the allegations in the statement of claim and denied that the defendant was in arrears of any instalments. It also counterclaimed for a declaration that the defendant was the owner of the freehold of the land on which the house was built, and in the alternative for rescission of the oral agreement of January 29, 1969, the refund of the deposit and all monies paid hitherto, amounting to $6,226 and for special and general damages. The special damages were clearly the sum of $6,226.

Evidence was led. My view however is that having regard to the notation on the deposit receipt, there can be no doubt that the agreement was for a leasehold. I do not think that under section 92 Evidence Act, it is open to the defendant to vary what the receipt so clearly stated, but in any event, if I am permitted to look at it, the evidence merely serves to confirm my view. I accordingly hold that the agreement was for a leasehold.

Next, the statement of claim averred that it was a further term of the oral agreement that the parties would enter into a formal agreement for the sale and purchase of the house and a registrable lease. This was denied by the defence. The denial was not merely as to the tenure of the land but as to the existence of this term. In my view, however, there can be no doubt as to this term. It is the only view that can be held if effect is given (and of course, it must be given) to the words "valued up to March 31, 1969," if "valid" is substituted for "valued." This view is also supported by the evidence that the plaintiff had tried to get the defendant to enter into a formal agreement and that the defendant had at all times refused.

This finding of fact on an averment by the plaintiff leads to the question of what is the effect on an oral agreement which is expressly made, in legal phraseology, "subject to a written contract." I invited counsel, particularly counsel for the plaintiff, to address me on this point, but possibly I did not make myself sufficiently clear as I did not receive any advice on it. However, it is, I think, settled law that under such a condition, no agreement crystallises where the parties fail at the time specified or within such time as may be reasonable in the circumstances, to enter into such a written contract: see, *inter alia, Chillingworth* v. *Esche*[1] and *Eccles* v. *Bryant*.[2] On this law, I must necessarily go on to hold that there never was a concluded and subsisting agreement between the parties.

The effect will then be: the defendant has no claim either to the freehold or the leasehold of the house and she and her husband have no right, however much they would have liked, to remain in the house or on the land. If they now find the result unwholesome, they have only themselves to blame for failing to enter into any agreement. They were at all times tenants at will, as contended by counsel for the plaintiff. On the other hand, if the plaintiff chose to treat them as such, he has no right to forfeit the deposit for the house. But of course the defendant must pay damages for the use and occupation of the house and land as a tenant at will, which in the contention of the plaintiff, she is.

For himself, the plaintiff must be consistent. Since he had let the defendant in on an agreement which was no agreement, he had, as he claimed, let in a tenant at will whose occupation had to be terminated by a notice to quit. He did send this notice. That being so, he could not now say he could forfeit the deposit. He is entitled to damages for use and occupation.

Such damages must be calculated on the rents reasonably to be obtained from the house. I have, however, no advice on houses in this locality. The parties had in mind $99 per month. This sum represents a 15 years' purchase, with a 10% interest per annum added. On the whole, I do not think it would be unfair to either side to assess the damages at $99 per month. In coming to this figure, I have deliberately omitted any further land rent, maintenance or insurance as these items were never made known to the defendant and there never was any consensus. The plaintiff has only himself to blame for his deposit receipt. I also remember the agreement of counsel for the defendant to the sums claimed by the plaintiff but I do not consider that in the light of my findings, he or the defendant is bound.

From November 1, 1969 to March 31, 1977, there are 89 months. At $99 p.m., the sum would be $8,811. But 31 instalments had been paid and so $3,069 will have to be deducted. The balance is $5,742. There will be no interest on this sum.

Judgment therefore will be entered for the plaintiff in the sum of $6,217 and an order is made for possession on or before June 30, 1977. There will also be an order for payment at $99 p.m. from April 1, until possession is given.

The counterclaim is allowed, to the extent that the plaintiff will be ordered to refund the sum of $3,950. Similarly there will be no order for interest.

In all the circumstances of the case, I consider a fair order as to costs is that there will be no order as to costs.

Judgment for the plaintiff.

Counterclaim allowed.

Solicitors: *Lovelace & Hastings; Ariffin & Ooi.*